92-498

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

Bernard W. Merling
Petitioner,
vs.
The Travelers Indemnity Company
Charter Oak Fire Insurance Company
Phoenix Insurance Company
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Maryland's mandatory property/casualty insurance policy renewal statutes impair and impinge upon an independent insurance agent's absolute ownership of his business ("expirations") following termination of the Agency Agreement between agent and insurer, in violation of the contract clause of the Constitution.

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PETITION FOR WRIT OF CERTIORARI

Bernard W. Merling respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The opinion and order of the Circuit Court for Baltimore City granting Merling Summary Judgment as to compensatory liability is unreported [App. A]. The opinion of the Court of Appeals of Maryland, that Merling's contract ownership of his expirations was superseded by statute, is titled *The Travelers Indemnity Company, Charter Oak Fire Insurance Company, and Phoenix Insurance Company v. Bernard W. Merling*, No. 30, Sept. Term, 1990, and is reported at 605 A.2d 83, 326 Md. 329 (1992). [App.B]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The judgment of the Court of Appeals of Maryland reversing the judgment of the trial court was entered on April 24, 1992. A timely petition for reconsideration was filed but was denied, June 5, 1992 [App. C].

CONSTITUTIONAL PROVISION INVOLVED

Article 1, Section 10, paragraph 1 of the Constitution of the United States provides that:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts;

pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant title of nobility.

MARYLAND STATUTES INVOLVED

Maryland Annotated Code [the "Code" hereafter]:

ARTICLE 48A,

§166(b)

§175

§234A

§234B

ARTICLE 1, §17

Chapter 73 of the Acts of 1972, as proposed

STATUTES OF OTHER STATES
[Referred to by the Court of Appeals]

Cal. Ins. Code §769(d) (West Cum.Supp.1992)

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N.M. Stat. Ann. §59A-11-13D, (Cum. Supp. 1991)

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STATEMENT OF THE CASE

1. The Parties

Petitioner, Bernard W. Merling ("Merling"), is a Maryland property/casualty insurance agent.

Respondents, The Travelers Indemnity Company, Charter Oak Fire Insurance Company and Phoenix Insurance Company ("insurers" or "the Travelers" hereafter) are property/casualty insurance companies through which the Petitioner placed insurance coverages for his clients, pursuant to an Agency Agreement between himself and the insurers. [See *infra* Appendix D, paragraph 9-12 of the complaint for ownership provisions.]

2. The Complaint

Merling's suit against the insurers was filed in the Circuit Court for Baltimore City on December 13, 1988 [Joint Record Extract with the Court of Appeals, "JR" hereafter, 3-16]. His complaint was founded in contract and tort for the alleged conversion of his business ("expirations") and interference with his economic and business relations with his clients, whose property/casualty insurance policies had been issued to them through his agency by the Travelers.

Merling asserted that the contract guarantees to him of absolute ownership of his expirations post termination of the Agency Agreement, under which the parties conducted their businesses, was not superseded by Article 48A §234B of the Code which provided, in part, that the insurer shall renew through the "agent" whose agency agreement had been terminated, "for not less than one year" those policies "which have not been replaced with other insurers as expirations occur." The trial court granted Merling summary judgment on this issue; the Maryland Court of Appeals reversed.

3. The issue as presented to Court

By his Complaint [App. D], Memorandum in Support of his Motion for Summary Judgment, Petition to the Court of Appeals for a Writ of Certiorari to the Court of Special Appeals, before argument in that court [App. E], by Brief and oral argument to the Court of Appeals and by his Petition for Reconsideration by the Court of its decision [App. F], Merling argued that: (1) the provision of §234B(b) of the Code, requiring the renewal of insurance policies through an agent whose Agreement had been terminated until they were replaced "as expirations occur" confirmed independent agency, as did the later enactment of §166(b), and (2) that the "for not less than one year" renewal provision of that section [whether read in isolation or in the light of the later §166(b) as required by Article 1 §17 of the Code] did not-and could not-diminish either the independent agent's ownership of his expirations and duty to his clients or the absolute right of those clients to continue to receive the services of the agent of their choosing.

4. The ownership provisions of the Agency Agreement

Paragraph 14 of the Agency Agreement provides, without time limitation, that the "use and control of expirations...the records

thereof, and the Agent's work product shall remain in the undisputed possession and ownership of the Agent" and that the Company would not use such records for any purpose, including the "renewal of any form of insurance coverage..."

Paragraph 15 of the Agreement [not referred to by the Court of Appeals] provides that "In the event of termination of this contract, and if Agent has paid all balances due the Company: a. The Agent's records, use and control of expirations, shall remain his property and be left in his absolute possession."

5. Maryland statutes affecting the insurer-independent agent- insured relationship subsequent to the termination of the agency agreement between the insurer and the insured's agent.

§234A prohibits the insurer from nonrenewing an insurance policy except for economic or business reasons. [605 A.2d at 88]

§234B(b) provides in relevant part that "the insurer shall continue for not less than one year after termination of the agency agreement to renew through the agent or broker any of the policies which have not been replaced with other insurers as expirations occur." [Cited by the Court in footnote 8 of its opinion. This provision, as recited by the Court, was a part of Chapter 73 of the Acts of 1972.]

§234B(c) quoted by the Court in its Opinion, *infra*, prohibits cancellation or nonrenewal of a policy for the reason that the agreement with the insured's agent was terminated.

§234B, as proposed by Chapter 73, Acts of 1972, did provide that insurers could appropriate the expirations of an "agent" following the termination of the agreement with the "agent." The provisions were stricken, however; none of the insurers' acts,

complained of by Merling, were authorized or approved by the General Assembly [App. G].

§166(b) By Chapter 819 of the Acts of 1976, this section of the Code was repealed and reenacted to define an independent insurance agent and to provide that "only those agents meeting this definition may hold themselves out to the public as Independent Insurance Agents." In pertinent part, an "independent agent" is one "whose agency agreement provides that at the termination of the agency the agent's records shall remain the property of the agent, and that the agent retains the use and control of all expirations incurred during the agency [App. G].

Article 1 §17 provides that where there are two or more amendments to the same section of the Code, the earlier enactment must either be reconciled with the later or give way to it. [App. G]

§175(15) prohibits making incomplete or misleading comparisons between insurers and policies for the purpose of replacing one company and policy with another company and similar policy. [App. G]

6. Pre-trial Motions

On March 1, 1989, a Motion to Dismiss Plaintiff's Complaint, and Memorandum in Support thereof, was filed [JR 19-51]. A reply to this Motion was filed on March 17, 1989 [JR 52-58]. Plaintiff also filed a Motion for Summary Judgment [JR 61-107], to which was appended the opinion of the Honorable Thomas Ward, Judge of the Circuit Court of Baltimore City [appended here as App. H], granting Summary Judgment on public policy grounds in an earlier case involving the same issues. [At trial, compensatory damages were awarded Merling.]

7. The Decision of the Court of Appeals

The Maryland Court of Appeals, in reversing the judgment of the trial court, held that:

> By Ch. 73 of the Acts of 1972, the General Assembly amended §234B so that a compromise was reached between the agent's right to his expirations following termination and the State's interest in protecting the insureds from cancellations or nonrenewals. As amended in 1972, the statute guarantees that the policies produced by the agent will be renewed through the agent for one year following the agent's termination [fn. 7, here, omitted but discussed *infra*].
>
> Thus, the agent is given the benefit from his expirations for at least a year after termination...At the end of that one-year period, or whatever longer period might be set forth in the agency agreement, the insurance company is required by §234B to renew the policies of those insureds who decide to stay with the company, unless there exists valid grounds for nonrenewal other than the termination of the agent. Section 234B(c) states: "No insurer shall cancel or refuse to renew the policy of the insured because of the termination of the agent's or broker's contract."
>
> Section 234B(c), therefore, requires the insurer to use the former agent's expirations to renew the policies of those insureds choosing to remain with the insurer. The statute obviously modifies an agent's property right in his expirations. Travellers was simply complying with the mandate of the statute, rather than interfering with Merling's property rights or converting Merling's property. [605 A.2d at 88-89]

8. Merling's Petition for Reconsideration

Merling filed a timely petition for reconsideration by the Court of its opinion, requesting that the Court take more particular note of the ownership provisions of the Agency Agreement and that it consider the relevance of §166(b) of the Code to the regulatory scheme. It was argued that the public interest was not served when the insured was required to choose between the agent of choice and the insurance in force and that it could not be a part of the public policy of the state to permit an insurer to appropriate an agent's expirations to its own use and benefit, to interfere with that agent's relationship to his business clients, and to deny those clients the freedom to choose their representative, all in the name of "protecting the insureds from cancellations or nonrenewals."

The Court was requested to reconcile the provision of §234B(b), as interpreted by it, with the provisions of §166(b), and to distinguish the facts upon which it relied from those which identify, by contract and statute an "independent agent," or, upon reconsideration, "[to] withdraw its Opinion as against the public policy of the State..." The Petition for reconsideration was denied.

REASONS FOR GRANTING THIS PETITION

1. As the Court of Appeals has interpreted §234B(b) of the Code, Merling and his clients have been denied the benefit of their contracts and of Maryland's regulatory statutes.

This petition should be granted because, without reversal, (a) Merling will have been denied the absolute ownership of and responsibility for his expirations, and the full benefit of that ownership, and (b), clients of Merling who have had the absolute right of ongoing representation by Merling would be required to choose between that absolute right and the statutory protection against

unwarranted cancellation or nonrenewal provided by §§234A and 234B of the Code.

2. **As the court has interpreted §234B(b) of the Code, all independent agents in Maryland, and all persons insured through their effort, will lose the benefit and protection of the Code; the enactment of §166(b) of the Code will have been rendered nugatory.**

Should this opinion not be reversed, no property/casualty insurance agent in the State of Maryland may hold himself out to the public as an "independent agent." The Maryland Court of Appeals has held that the agent is the absolute owner of his expirations only until twelve months after termination of the Agency Agreement, thus negating the contractual and statutory obligation of all insurers to all "independent agents" in the state of Maryland; indeed, rendering nugatory §166(b) of the Code. [Limited ownership under §234B(b) cannot be reconciled with absolute ownership as guaranteed by contract and defined by §166(b) of the Code. For the Court of Appeals to be correct, the provision of the later §166(b) must yield to the earlier §234B(b)].

The contractual, common law and statutory duty of the independent agent to the insured has likewise been adversely affected or clouded by this opinion. While the status and ownership protection of independent agency, and the right of free choice, has been diminished by the Court of Appeals, the duty of an agent to the applicant for insurance has not and the potential for liability to that applicant/insured has not; §234B(c) provides that the insurer may not cancel or non-renew a policy simply because the policyholder's agent no longer is under agreement with the insurer, but, as determined by the Court of Appeals, the agent either continues to represent the client, for free and at risk, or he gives up the value of that representation.

3. Independent agency—its important place in the property/ casualty insurance industry

The law of independent agency, prior to the advent of mandatory renewal statutes, was well settled. The question presented by this litigation is whether those well settled principles are superseded by statute.

The custom of leaving the choice of insurance company to the agent was "so universal," the court took judicial notice and concluded that the business of such an agent "has a well-recognized value, the subject of sale..." [*National Fire Ins. Co. v. Sullard*, 97 App. Div. 233, 89 NYS 934, 937-38 (N.Y.App. 1904)]; it was a matter "of common knowledge" that the agent acted "in behalf of the agency" [*In re Chapman*, 50 F.2d 252, 253 (D.C.Ky. 1931)] "as the agent for the insured, and not the insurer, in all matters connected with such procurement" [*American Casualty Co. of Reading Pa. v. Ricas*, 179 Md. 627, 22 A.2d 484, 487 (1941)], owing the insured "a duty of the highest order," "bound to keep him fully informed" [*Butler v. Scott*, 417 F.2D 471 at 473 (10th Cir. 1969)]. "In a real sense the agent and not the insured is the company's customer;" for that reason, and because the agent pays all of his own expenses and overhead, "the insurance company scrupulously avoids direct contact with the insured..." [*In re Roy A. Dart Insurance Agency, Inc.*, 5 Bankr. 207, 209-10 (D. Mass. 1980)]. "This universal custom is a main premise under which the American insurance industry functions and is known as the American Agency System" [*Matter of the Estate of Corning*, 108 A.D.2d 96, 488 N.Y.S.2d 477, 481, appeal dismissed and withdrawn, 67 N.Y.2d 758, 500 N.Y.S.2d 1029, 490, N.E.2d 1235 (N.Y. App. 1985)].

The concept of independent agency, perhaps, was best analyzed by the Eighth Circuit Court of Appeals. In *Fred Miller Co. v. Empire Fire & Marine Ins. Co.*, 503 F.2d 751 (8th Cir. 1974) the court explained:

> In a three-tier system [insurer-agent-insured] the company only comes into possession of the records of an individual policy through the efforts of its agent. By custom or contract these records are reserved to the agent upon termination. Id. at 756.
>
> This ownership and control of expirations is a protection of the work product of the individual agent and in this ownership and control he is protected from any interference with his relationship to the insured...Id. at 755.
>
> Such protection also serves a business purpose for the insurance company, for without this assurance it is unlikely an agent would devote time and expense to developing business in that particular company with the knowledge that once developed the renewals might be appropriated with impunity...Id. at 757.

4. The Court of Appeals has equated absolute ownership of expirations with ownership which is shared, on termination of the Agreement with the insurer.

Contemporaneously with the development of the law of independent agency, litigation involved situations where the courts held that the ownership of expirations was shared, negating independent agency as described by the American Agency System. *See, e.g., Ballagh v. Polk-Warren Mutual Insurance Assn.*, 136 N.W.2d 496 (Iowa 1965). A further reason for the Court to grant this petition is the apparent judicial confusion of the law pertaining to independent agency with that relative to the factual background of *Ballagh*.

In *Ballagh*, the agency had purchased the business placed with six insurers by the selling agency. With five of those insurers, the purchaser entered into written "American Agency System" agree-

ments; not with the sixth, however. This last insurer, being dissatisfied with the new agency, "sent a form letter to all of their policyholders...which violated the provisions of the American Agency System, if applicable to the relationship between these parties." The court held that, because the agent worked for the agency, "...justice and fair dealing between the company and the agency demands that the agent be declared to be the owner of the expirations." However, the court continued, exclusive ownership "depends upon the American Agency System...;" not proven here, the agency and the company were "...both free to use information available to them from their own files in soliciting insurance business." Id., 136 N.W.2d at 498, 501.

The reasoning in *Ballagh* was applied in the post-mandatory renewal statute case of *Shrewsbery v. Nat'l Grange Mut. Ins. Co.*, 183 W.Va. 322, 395 S.E.2d 745 (1990). The ownership guarantee, there, was that the company would not "refer or communicate the names of policyholders and expiration dates to any other Agent, broker or person for purpose of solicitation." Id. 749.

The court held that this provision meant that "The company agreed not to give information it had about Mr. Shrewsbery's customers to other of its agents;" the plaintiff was free to use the same information "aggressively" in attempting to keep his customers, but that the company, in offering renewals, acted in compliance with the directive of the insurance commissioner. Id. 750.

The Maryland Court of Appeals has held that "when the language of the contract is plain and unambiguous there is no room for construction...," *General Motors Acceptance Corporation v. Daniels*, 303 Md. 254, 492 A.2d 1306, 1310 (1985). Here, supporting its conclusion that the public policy of the State requires that the independent agent surrender his expirations to the insurer, to the extent they cannot be salvaged, the Court has construed paragraph 14 of the Agency Agreement [and ignored paragraph 15 thereof] in a way which would appear to conform that paragraph

with the similar part of the National Grange agreement. Adopting the "shared ownership" reasoning of that case, the Court opined that the agent's property right "has been modified by Art 48A, §234B."

5. Footnote "7" in the Court's Opinion

Subsequent to mandatory renewal statutes, a number of states, referred to below and cited by the Court of Appeals in footnote 7, have enacted laws concerning policy renewal and the insurer-agent-insured relationship following termination of the agent's contract.

California, Kansas, New Mexico, Pennsylvania, Rhode Island and Delaware enacted statutes which would require limited renewals through the so-called "terminated agent." The Delaware statute was declared a violation of Art. 1, §10 of the Constitution of the United States; *Opinion of the Justices*, 283 A.2d 832 (Del., 1971); the statutes of California, Kansas, New Mexico, Rhode Island and Pennsylvania appear not to have not been tested.

The State of Massachusetts has recognized independent agency and the agent's "exclusive right to his expirations," as has the New York legislature [App. G].

The Court of Appeals correctly noted that Arizona recognizes independent agency, but incorrectly cited the current law of the State of New Jersey with regard to that status.

By letter to the Maryland Court of Appeals dated December 7, 1990, two later amendments to that section of the New Jersey Code, and appellate decisions based upon each, were called to the attention of the court [App. I]. In *Cohen v. Home Ins. Co.*, 230 N.J. Super 72, 552 A.2d 654 (1989) the court held that the then statutory time limitation of commissions to a "terminated" agent did not insulate the insurer from liability for commissions due thereafter where the independent agent continued to service the needs of his clients. In *In the Matter of the Terminated Aetna Agents*, the court struck down

an agreement reducing, and ultimately eliminating, the independent agent's commissions subsequent to termination of the agency agreement. Citing N.J.S.A. 17:22-6.14a(1), the court held the agreement to be against the public policy of the State; 248 N.J. Super. 255, 590 A.2d 1189 (12-3-90), certiorari denied 2-21-91.

It was suggested to the Court that the New Jersey statutory amendments paralleled those of Maryland. There would seem to be no practical difference between guaranteeing continued commissions for a period of time or renewals "for not less than" a period of time, since an agent's commissions are generated from each renewal.

There also would seem to be no difference between defining independent agency, as by Maryland statute, and providing, as New Jersey did, that renewals and commissions must continue through the so-called terminated agent at the election of the insured.

THE MANDATORY PROPERTY/CASUALTY INSURANCE POLICY RENEWAL STATUTE, AS INTERPRETED BY THE MARYLAND COURT OF APPEALS, VIOLATES THE CONTRACT CLAUSE OF THE CONSTITUTION.

The Maryland Court of Appeals, in *Maryland-Nat'l Capital Park and Planning Commission et al. v. Washington Nat'l Arena*, 282 Md. 588, 386 A.2d 1216 (1978), at 1228-1229, explained "public policy" and its reluctance to strike down "commercial and contractual relations" in the following terms:

> From the dawn of the common law tradition in England, courts have refused to implement those private contractual undertakings which, when measured against the prevailing mores and moods of society, contravene judicial perceptions of so-called "public policy" (Citations omitted)...

> This Court stated early on that considerations of public policy are deemed paramount to private rights and where conflict between the two exists, private interests must yield to the public good (Citation omitted)...
>
> Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where "the common sense of the entire community would...pronounce it" invalid. (Citations omitted) This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle. (Citations omitted)

Merling's absolute ownership of expirations, as defined by contract and statute, has been pronounced invalid, nullified on public policy grounds by the Maryland Court of Appeals, on the assumption that the enactment of §234B(b), by Chap. 73 of the Acts of 1972, was a "compromise" between the agent's ownership and the policyholders' right to the renewal of his policy.

CONCLUSION

It is submitted that the decision of the Maryland Court of Appeals conflicts with its own prior decisions and with the decisions of the appellate courts of New Jersey and Delaware. As interpreted by the Court of Appeals, §234B(b) of the Code impairs

and impinges upon the independent agent's absolute ownership of his business, developed through the insurer, and denies to those insureds, wishing to maintain their policies and the protection of the Code, the freedom to continue to retain the services of their chosen agent. The decision of the Maryland Court of Appeals, in this case, cannot be sustained.

For all the foregoing reasons, it is requested that this petition be granted.

September 1, 1992

Respectfully submitted,

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APPENDIX A

In the Circuit Court for Baltimore City

Civil Action Number 88-348037/CL 90572

Bernard W. Merling
doing business as
Merling & Son,

Plaintiff

vs.

The Travelers Indemnity Company, et al

Defendants

An oral argument before the Honorable Thomas Ward, Baltimore City Circuit Court Judge, was held on Wednesday, May 10, 1989 commencing at 10:15 a.m., at the Clarence M. Mitchell, Jr. Courthouse, 100 North Calvert Street, Suite 408, Baltimore, Maryland before Deborah C. D. Shumaker, Notary Public.....

JUDGE WARD.....Here is the posture that I think I am in right now. I have to tell you that I understand the case and I understand all of the issues involved and I think that he is entitled to his commissions ad infinitus because, and this is my reason, it is a casualty property account and he is an independent agent and it has been agreed that he is an independent agent, and I do not think that the contract clause that you read to me precludes, that is, his authority with Travelers, precludes that in this language.

Therefore, I think under the common law of casualty property insurance agents he is entitled to the commissions on casualty property insurance through when he has a diverse selection of companies that he can send business to ad infinitum. As long as that customer continues the business with that company he is entitled to his regular commission that he would have been entitled to if he had just placed the business with the company. That

includes increases in the policy, decreases in the policy, add-on, subtractions. But of course, once the insurance is terminated either by the company or by the customer then his commission would end even though the customer might return a year later and go back with the company. He is not responsible for that. Therefore, you would not be entitled to his commission.

I think that the punitive damages is out. No amendment. I don't see any evidence here whatsoever. The primary judgment as to damages and RICO is out, no amendment. I don't see any evidence of that at all in this case.....

ORDER

This matter having come before the Court on the Motion of Defendants, The Travelers Indemnity Company, The Charter Oak Fire Insurance Company, The Phoenix Insurance Company and Henry A. Fiorini, to Dismiss all Counts of Plaintiff's Complaint; and on the Motion of Plaintiff for Summary Judgment on all Counts against the three corporate Defendants and also Counts I and III against Defendant Fiorini; and the Court having considered the written arguments of the parties and heard the parties on May 10, 1989, it is hereby

ORDERED, this 8 day of June, 1989, that:

1. Defendants' Motion to Dismiss be GRANTED as to Count IV and as to the claim for punitive damages on all Counts, without leave for Plaintiff to amend.

2. Defendants' Motion to Dismiss is otherwise DENIED.

3. Plaintiff's Motion for Summary Judgment as to liability for compensatory damages is GRANTED as to Counts I, II and III, it being the ruling of the Court that Plaintiff is entitled to renewal

commissions on policies renewed after the date of termination of the agency agreement [a period was added here by the Court] ~~so long as~~ Plaintiff ~~services such policies~~.*

/s/ THOMAS WARD

(Judge's signature appears on the original document.)

**Editor's Note:* Stricken by the Court, and the following added by the Court: [Plaintiff] "shall have the obligation to service all future policy renewals."

APPENDIX B

TRAVELERS INDEMNITY v. MERLING
Cite as 605 A.2d 83 (Md. 1992)

326 Md. 329

The TRAVELERS INDEMNITY COMPANY,
Charter Oak Fire Insurance Company
and Phoenix Insurance Company

v.

Bernard W. MERLING.

No. 30, Sept. Term, 1990.

Court of Appeals of Maryland.

April 24, 1992.

After independent insurance agent's agency was lawfully terminated by insurer and insurer notified insureds who were agent's clients that business relationship between insurer and agent had ended but that insureds' policies would continue to be renewed as required by law, agent brought suit against insurer. The Circuit Court, Baltimore City, Thomas Ward, J., entered judgment against insurer, and insurer and agent appealed. After grant of petitions for writ of certiorari, the Court of Appeals, Eldridge, J., held that: (1) insurer's letters to clients were in compliance with statute and did not constitute interference with agent's property rights in information about clients or conversion of agent's property; (2) assuming that there existed contracts between insurance agent and insureds which were separate from policies and that insurer interfered with those contracts by renewing policies of insureds as house accounts instead of agent, agent still would not be entitled to recover damages from insurer

for allegedly wrongful interference with contractual or economic relations; and (3) insurer's letters did not violate federal mail fraud statute and would not support RICO claim.

Reversed in part; affirmed in part; and remanded with directions.....

Argued before MURPHY, C.J., ELDRIDGE, RODOWSKY, McAULIFFE and CHASANOW, JJ., and CHARLES E. ORTH, Jr., Judge of the Court of Appeals of Maryland (retired) Specially Assigned.

ELDRIDGE, Judge.

This case concerns the rights of an independent insurance agent, whose agency was lawfully terminated by the insurer, with respect to insurance policies which the agent had originally produced but which were renewed by the insurer after the termination of the agency.

The plaintiff Bernard W. Merling is an independent insurance agent, and, as such he may place his clients with one of several insurance companies, depending upon the best interests of those clients. Merling had entered into an agency agreement with the defendant insurance companies, who are the Travelers Indemnity Company, the Charter Oak Fire Insurance Company, and the Phoenix Insurance Company (hereinafter collectively referred to as "Travelers").[1] The agency agreement authorized Merling to solicit, bind and issue Travelers' insurance policies for certain types of risks. In exchange for selling Travelers' insurance policies, Merling was entitled to receive as commissions a percentage of the premiums paid on all policies originated or renewed through Merling. The agency agreement also provided

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[1]The Charter Oak Fire Insurance Co. and the Phoenix Insurance Co. are subsidiaries of the Travelers Indemnity Company.

for termination of the agency relationship upon 120 days notice by either party.

On September 19, 1986, Travelers notified Merling by letter that he was to be terminated effective January 30, 1987. A subsequent letter extended this date to February 20, 1987. The reason for his termination, as stated in the original letter, was Merling's inability to produce any quantity of certain types of business. Although Merling complained to Maryland's Insurance Commissioner, the Commissioner concluded that his termination was lawful under the Insurance Code, Maryland Code (1957, 1991 Repl. Vol.), Art. 48A, § 234B. Merling did not seek judicial review of the Commissioner's decision pursuant to Art. 48A, §§ 40 and 234C. Merling has not, and indeed could not, collaterally challenge that administrative determination by the Insurance Commissioner in the present action.

Travelers' termination letter advised Merling that, "in line with contract provisions [of the agency agreement] we will offer to renew all existing business which meets our current underwriting standards for one year after the effective date of this termination." Travelers, in accordance with that agreement, paid Merling the renewal commissions for the one year from February 20, 1987, to February 20, 1988. During that one year period, Merling was able to place some of his clients with other insurance companies, either directly or through another agent. Nevertheless, many of Merling's clients chose to remain with Travelers.[2] Merling wrote a letter to these clients stating that Travelers "has discontinued its business relationship with" Merling, that Merling had originally placed the clients with Travelers as it was in their

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[2]According to Merling, some of his clients had no choice but to remain with Travelers as the underwriting standards for new business are much higher than for renewal business. Thus, no new carrier would insure these clients as new business, while Travelers was obligated by statute to renew their policies.

best interests, and that it was in their best interests to stay with Travelers.

After February 20, 1988, Travelers notified Merling's clients directly that the business relationship between Travelers and Merling had ended. The letter also stated that, as required by law, their policies would continue to be renewed. The letter, however, informed the insureds that Merling was "in the best position to handle your insurance needs, including placing your insurance with another company." The letter further stated that "[w]e urge you to contact your insurance agent for counseling . . . or if you wish to continue insuring with The Travelers, a bill will be sent to you shortly."

Those insureds deciding to remain with Travelers had their policies recoded to a house account, with no agent listed on the policy. The policies were renewed directly through Travelers. No renewal commissions on these policies were paid to Merling or to any other agent after February 20, 1988.

On December 13, 1988, Merling instituted in the Circuit Court for Baltimore City the present action against Travelers, alleging that Travelers had committed various torts with regard to Merling's property rights and contract rights. The complaint initially set forth in detail the facts as summarized above. Thereafter, count one of the complaint, labeled "Conversion," asserted that the defendants had converted Merling's "personal property by appropriating to their own exclusive use and ownership the expirations entrusted to them by Plaintiff."[3] Count three, labeled "Intentional Interference With Property Rights," asserted that Merling "was the sole and exclusive owner of his work product, called 'expirations,' " and that the "[d]efendants interfered with and deprived Plaintiff of his

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[3] "Expirations" refers to an agent's work product or the information collected by the agent with regard to his clients.

property right to his expirations." The substance of both count one and count three was the same, namely that Merling's expirations were "converted" or "interfered with" by Travelers' action in sending renewal policies and premium invoices to Merling's former clients in such a manner that the business was not renewed through Merling and was renewed as house accounts.[4]

The second count of Merling's complaint asserted that Travelers had intentionally interfered with the contractual or economic relations between Merling and his clients, and the fourth count alleged that Travelers had violated the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). Merling sought both compensatory and punitive damages.

Travelers filed a motion to dismiss, and Merling filed a motion for summary judgment with regard to liability. The circuit court granted Merling's motion for summary judgment on the first three counts, concluding that Merling was "entitled to his commissions ad infinitum . . . [a]s long as that customer continues the business with that company . . . ." The circuit court conditioned Merling's entitlement to damages upon Merling's continued servicing of those policies. The circuit court granted Travelers' motion to dismiss with respect to the RICO count and the request for punitive damages.

A separate trial was then held before a different judge on Merling's damages. At the conclusion of the trial on damages, the circuit court entered judgment against Travelers in the amount of $59,892.02 plus interest. Both parties appealed to the Court

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[4]The reason for having both counts one and three in the complaint might have been a concern over the scope of the tort of conversion, or trover as it was formerly know, at common law. *See* 1 Poe, *Pleading and Practice*, §§ 206-219 (5th ed. 1925); Prosser, *Laws of Torts*, § 15 (4th ed. 1971).

of Special Appeals, and, prior to oral argument in the Court of Special Appeals, both sides petitioned this Court for a writ of certiorari. We granted both petitions.

I.

[1] In the Circuit court and in this Court, Merling argued that common law principles gave him exclusive ownership of his expirations. He contended that Travelers' use of those expirations to contact his insureds tortiously violated his property rights and amounted to a conversion of his property. In this Court, Merling insists that "[t]he claims below were not predicated upon a right to renewal commissions based on contract. Rather, the claims below were in tort, for the conversion of an independent agent's expirations, for intentional interference with his contractual relations with his clients (the insureds), and for the intentional interference with his property rights."[5] (Merling's brief, pp. 1-2). Consequently, as Merling's counsel conceded at oral argument, the case primarily turns on the nature of Merling's expirations as a property right.

[2] The term "expirations" has a definite meaning, and, as stated in *V.L. Phillips & Co. v. Pennsylvania Threshermen, Etc.*,

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[5] A right to renewal commissions must be granted by the language of the agency contract. In the absence of a provision in the agreement providing continued payment of renewal commissions after termination, an agent has no right to such commissions. *Niroo v. Niroo*, 313 Md. 226, 234-235, 545 A.2d 35, 39 (1988); *Travelers' Ins. Co. v. Hermann*, 154 Md. 171, 185, 140 A. 64, 69 (1928); *Rosenberg v. Lipman*, 143 Md. 512, 517, 122 A. 781, 782 (1923); *Scott v. Travelers' Ins. Co.*, 103 Md. 69, 77, 63 A. 377, 380 (1906); *Pruitt v. Southern Underwriters, Inc.*, 83 So.2d 115, 116 (Fla. 1955); *Anderson v. Farm Bur. Mut. Ins. Co.*, 112 Idaho 461, 469, 732 P.2d 699, 707 (1987); *Becker v. Nahm & Turner, Inc.*, 435 S.W.2d 750, 752 (Ky. 1969). *See also* 16B Appleman, *Insurance Law and Practice*, § 9003 (1981); *Couch on Insurance*, 2d, § 26A: 232 (1984); W.R. Habeeb, *Insurance Agent's Right to Commissions on Renewal Premiums*, 36 A.L.R.3d 958, (1971).

199 F.2d 244, 246 (4th Cir.1952), *cert. denied*, 345 U.S. 906, 73 S.Ct. 645, 97 L.Ed. 1342 (1953), includes

> "the records of an insurance agency by which the agent has available a copy of the policy issued to the insured or records containing the date of the insurance policy, the name of the insured, the date of its expiration, the amount of insurance premiums, property covered and terms of insurance."

See also, e.g., Fred Miller Co. v. Empire Fire and Marine Insurance Co., 503 F.2d 751, 752 n. 1 (8th Cir.1974); *Woodruff v. Auto Owners Ins. Co.*, 300 Mich. 54, 59-60, 1 N. W.2d 450, 453 (1942); *Kerr & Elliott v. Green Mountain Mut. Fire Ins. Co.*, 111 Vt. 502, 510, 18 A.2d 164, 168 (1941); *Shrewsbery v. National Grange Mut. Ins.*, 183 W.Va. 322, 395 S.E.2d 745, 749 (1990); *Blume v. Curson*, 447 S.W.2d 727, 730 (Tex.App.1969); *Garrett v. American Family Mutual Insurance Co.*, 520 S.W.2d 102, 108 n. 1 (Mo.App.1974); *Matter of Estate of Corning*, 108 A.D.2d 96, 99, 488 N.Y.S.2d 477, 480 (1985); *Calley v. United States*, 220 F.Supp. 111, 113-114 (S.D.W.Va.1963).

This bundle of information is recognized in the insurance field as a "valuable asset in the nature of good will." *V.L. Phillips & Co. v. Pennsylvania Threshermen, Etc., supra*, 199 F.2d at 246. *See also Fred Miller Co. v. Empire Fire & Marine Insurance Co., supra*, 503 F.2d at 752 n.1; *Shrewsbery v. National Grange Mut. Ins., supra*, 395 S.E.2d at 750; *Calley v. United States, supra*, 220 F.Supp. at 114. It provides the insurance agency with the opportunity to contact the insured prior to termination of a policy and either renew the policy or secure another policy with a different insurance company. The custom and usage in the insurance trade recognizes this asset as a property right belong to the agent. *See Fred Miller Co. v. Empire Fire & Marine Insurance Co., supra*, 503 F.2d at 754-755; *Spier v. Home*

Insurance Company, 404 F.2d 896, 898 (7th Cir.1968); *V.L. Phillips & Co. v. Pennsylvania Threshermen, Etc., supra*, 199 F.2d at 246; *Woodruff v. Auto Owners Ins. Co., supra*, 300 Mich. at 59-60, 1 N.W.2d at 453; *Kerr & Elliott v. Green Mountain Mut. Fire Ins. Co., supra*, 111 Vt, at 510, 18 A.2d at 168; *Shrewsbery v. National Grange Mut. Ins., supra*, 395 S.E.2d at 750; *Calley v. United States, supra*, 220 F.Supp. at 114; *Hedlund v. Farmers Mutual Automobile Insurance Company*, 139 F.Supp. 535, 537 (D.Minn. 1956). The cases refer to this custom and usage in the insurance trade as the "American Agency System." *See, e.g., Fred Miller Co. v. Empire Fire & Marine Insurance Co., supra*, 503 F.2d at 754-755; *Spier v. Home Insurance Company, supra*, 404 F.2d at 898; *Woodruff v. Auto Owners Ins. Co., supra*, 300 Mich. at 59-60, 1 N.W.2d at 453; *Hedlund v. Farmers Mutual Automobile Insurance Company, supra*, 139 F.Supp. at 537.

[3] Under American common law principles, *i.e.*, under the American Agency System, if an insurance company terminated an agent, the company was prohibited from interfering with the agent's property right in the expirations. This meant that the company could not use the expirations to directly solicit the insureds or to refer them to other agents who represented the company. *V.L. Phillips & Co. v. Pennsylvania Threshermen, Etc., supra*, 199 F.2d at 248 ("The [company] had no right to solicit directly from the insured nor could it do so indirectly by appointing plaintiffs' former agents and thereby acquire through them the expirations and use them to the prejudice of plaintiffs"); *Woodruff v. Auto Owners Ins. Co., supra*, 300 Mich. at 60, 1 N.W.2d at 453 ("the so-called clientele . . . of an insurance agent may be preserved to him as far as possible upon the termination of his agency"). *See also Calley v. United States, supra*, 220 F.Supp. at 114. The result was that, upon termination of the

agent, a majority of the policies which originated from that agent were not renewed.[6]

[4] Even though the American Agency System gave the agent a property right in his expirations, several courts concluded that the insurance company was permitted, if not required, to contact the insureds directly after an agent's termination. *See Spier v. Home Insurance Company, supra*, 404 F.2d at 899 (it was the company's duty to inform its insureds of the termination, and the American Agency System did not change that duty); *Hedlund v. Farmers Mutual Automobile Insurance Co., supra*, 139 F.Supp. at 537 (letter to the insureds was sent without malice and had no ulterior purpose other than to provide the insureds with important information); *Woodruff v. Auto Owners Ins. Co., supra*, 300 Mich. at 60, 1 N.W.2d at 453 (American Agency System "does not cut off all right of the insurer to contact persons to whom its policies have been issued through the discontinued agency").

The above-cited cases indicate that even under common law principles, the agent's right to his expirations was not absolute. Moreover, Maryland, like many other states, has legislatively changed the common law American Agency System.

By Ch. 417 of the Acts of 1970, the General Assembly added §§ 234A, 234B and 234C to the Insurance Code, Art. 48A. Section 234A was enacted to prohibit insurance companies from engaging in numerous underwriting practices deemed arbitrary or discriminatory, including the practice of what is called "redlining," whereby insurers would refuse to renew or write policies based on the geographic area in which the insureds or

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[6]This prohibition against the insurance companies' use of the agent's expirations to directly solicit the insureds did not prohibit the insureds from seeking out the company on their own in order to renew their policies. *See V.L. Phillips & Co. v. Pennsylvania Threshermen, Etc.*, 199 F.2d 244, 247-248 (4th Cir.1952); *cert. denied*, 345 U.S. 906, 73 S.Ct. 645, 97 L.Ed. 1342 (1953).

applicants lived. Section 234A, *inter alia*, required insurers to renew existing policies unless the insurers could demonstrate certain economic or business reasons for the refusal to renew. Section 234B protected insurance agents from arbitrary or discriminatory termination by insurers. Section 234C granted to the Insurance Commissioner the power to order an insurance company either to accept the risk of an insured or the business from an agent if the Commissioner finds a violation of either § 234A or § 234B.

Sections 234A, 234B, and 234C, as originally enacted in 1970, still did not completely prevent the nonrenewal of insurance policies for reasons unrelated to legitimate underwriting considerations. Under the American Agency System, the insurance companies could not use the expirations of a terminated agent to renew the policies of insureds. Therefore, when an agent in a particular geographic area was terminated for a legitimate reason, the effect was that the insurance policies of that agent's clients were not renewed.

By Ch. 73 of the Acts of 1972, the General Assembly amended § 234B so that a compromise was reached between the agent's right to his expirations following termination and the State's interest in protecting the insureds from cancellations or nonrenewals. As amended in 1972, the statute guarantees that the policies produced by the agent will be renewed through the agent for one year following the agent's termination.[7] The

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[7]Other states which have enacted similar mandatory renewal provisions also recognize the tension between the provision and an agent's right to his expirations. Of those states, most of them have provided the agent with at least a year's worth of renewal commissions following termination. *See* Ca.Ins.Code § 769(d) (West Cum.Supp.1992); Del.Code Ann. tit. 18 § 529 (1975, 1989 Rep.Vol.); Kan.Stat.Ann. § 40-2, 107(b) (1986); Mass.Ann.Laws ch. 175, § 163 (Law.Co-op.Cum.Supp.1991); N.M.Stat.Ann. § 59A-11-13 D (Cum.Supp.1991); N.Y.Ins.Law § 3425(j)(1)(D) (Consol.1985) (only provides the agent with 120 days); Pa.Stat.Ann tit. 40, § 243 (Purdon Cum.Supp.1991); R.I.Gen.Laws § 27-

statute also permits the agency agreement to set forth a longer period.[8]

Thus, the agent is given the benefit from his expirations for at least a year after termination; he is guaranteed at least a year's worth of renewal commissions. During that year the agent may, as Merling did, place his clients with other insurance companies or broker his clients through another agency. The agency may also sell his expirations outright to another agency, as they are a marketable asset.[9] At the end of that one year period, or whatever longer period might be set forth in the agency agreement, the insurance company is required by § 234B to renew the policies of those insureds who decide to stay with the company, unless there exist valid grounds for nonrenewal other than the termination of the agent. Section 234B(c) states: "No

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3.45 (1989). *But see* Ariz.Rev.Stat.Ann. § 20-1631.E (1990) (agent remains agent of record even after termination and entitled to same level of compensation as long as he continued to service the policy); N.J.Stat.Ann. § 17:22-6.14a(c) (West Cum.Supp.1991).

[8]Maryland Code (1957, 1991 Rep.Vol.), Art. 48A, § 234B(b) provides in part as follows (emphasis added):

* * * * * *

"(b) If an insurer intends to cancel a written agreement with an agent or broker, or intends to refuse any class of renewal business from the agent or broker, the insurer shall give the agent or broker not less than 90 days written notice. Notwithstanding any provision of the agreement to the contrary, *the insurer shall continue for not less than one year after termination of the agency agreement to renew through the agent or broker any of the policies which have not been replaced with other insurers as expirations occur.*"

[9]The terminating insurance company may even choose to purchase the expirations itself, as it may wish to eliminate the agent's involvement immediately. By purchasing the expirations prior to the end of the one year post termination period, the company avoids paying the agent the renewal commissions for that year and prevents the agent from interfering with the policies of the current insureds.

insurer shall cancel or refuse to renew the policy of the insured because of the termination of the agent's or broker's contract."

Section 234B(c), therefore, requires the insurer to use the former agent's expirations to renew the policies of those insureds choosing to remain with the insurer. The statute obviously modifies an agent's property right in his expirations. Travelers was simply complying with the mandate of the statute, rather than interfering with Merling's property rights or converting Merling's property.

[5] Merling also points to paragraph 14 of his agency agreement with Travelers as confirming his property right in his expirations. Paragraph 14 recognizes Merling's "control of [his] expirations," provides that Travelers will not use them in a way "which shall abridge the Agent's rights," and the Travelers will not "refer or communicate this expiration information or work product to any other Agent or Broker." Merling does not argue however, that paragraph 14 grants him greater rights in his expirations than he would otherwise have, and that such contractually granted greater rights continue even after the expiration of the agency agreement. Moreover, nothing in the language of paragraph 14 would support such an argument. In addition, paragraph 13 of the agreement appears to embody the one-year post termination period guaranteed by § 234B(b) for renewals through the agent, as it provides that, after termination, all policies expiring "may, at the option of the Agent, be renewed for one additional year, at the rate of commission and upon the terms in effect at the time of termination." Paragraph 14 of the agency agreement simply recognizes the agent's common law property right in his expirations. That property right, however, has been modified by Art. 48A, § 234B.

Travelers' alleged actions in this case, being entirely in accordance with § 234B, did not constitute a conversion of or interference with Merling's property rights. The circuit court

erred in granting Merling's motion for summary judgment on counts one and three of his complaint.

II.

The circuit court also granted Merling's motion for summary judgment on the count asserting an intentional interference with the contractual or economic relations between Merling and his clients.

[6] Merling appears to recognize that, to the extent that the contractual or economic relations among the clients, Merling, and Travelers are reflected in the insurance policies, Travelers cannot be guilty of the tort of wrongful interference with contractual or economic relations because it is a party to the insurance policies. For the tort to lie, the defendant tortfeasor cannot be a party to the contractual or economic relations with which he has allegedly interfered. *See, e.g., K & K Management v. Lee*, 316 Md. 137, 154-156, 557 A.2d 965, 973-974 (1989); *Sharrow v. State Farm Mutual*, 306 Md. 754, 763, 511 A.2d 492, 497 (1986); *Natural Design, Inc. v. Rouse Co.*, 3203 Md. 47, 69, 485 A.2d 663, 674 (1984); *Wilmington Trust Co. v. Clark*, 289 Md. 313, 329, 424 A.2d 744, 754 (1981) ("there is no cause of action for interference with a contract when suit is brought against a party to the contract"); *Shrewsbery v. National Grange Mut. Ins., supra*, 395 S.E.2d at 748 ("no one can be liable for tortious interference with his own contract"). Merling contends, however, that "[t]he contract here interfered with is the personal services contract between the independent agent and his client, rather than the contract of indemnity issued by the insurer...." (Merling's brief, p. 22).

[7,8] Assuming arguendo that there existed contracts between Merling and the insureds which were separate from the insurance policies and that Travelers interfered with those contracts by renewing the policies of the insureds as house accounts instead

of through Merling, Merling still would not be entitled to recover tort damages for Travelers' interference. For one to recover for tortious interference with contractual or economic relations, the interference must have been wrongful or unlawful. *K & K Management v Lee*, *supra*, 306 Md. at 765, 511 A.2d at 498; *Natural Design, Inc. v. Rouse Co.*, *supra*, 302 Md. at 71-74, 485 A.2d at 675; *Stannard v. McCool*, 198 Md. 609, 616, 84 A.2d 862, 866 (1951); *Sumwalt Ice Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 413, 80 A. 48, 50 (1911).

For the reasons set forth in Part I of this opinion, Travelers' actions were neither wrongful nor unlawful. Therefore Travelers did not tortiously interfere with Merling's contractual or economic relations with his clients. The circuit court erroneously granted Merling's motion for summary judgment on count two of the complaint.

III.

[9] In his cross appeal, Merling challenges the circuit court's dismissal of the count alleging a violation of RICO, 18 U.S.C. §§ 1961-1968. Section 1962(b) provides as follows:

> "(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Section 1964(c) states:

> "(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover

> threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.[10]

The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 481-482, 105 S. Ct. 3275, 3277, 87 L.Ed.2d 346, 349-350 (1985), explained the term "racketeering activity" in RICO as follows:

> "RICO takes aim at 'racketeering activity,' which it defines as any act 'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law. § 1961(1)."

Merling argues that Travelers' actions in mailing "hundreds of deceptive letters to Merling's policyholders, by which the Travelers Companies appropriated the expirations," constituted a "fraudulent appropriation to one's own use of another's property entrusted to him." (Merling's brief, p. 39). According to Merling, this conduct by Travelers amounted to "mail fraud" in violation of the federal mail fraud statute, 18 U.S.C. § 1341, and, therefore, amounted to "racketeering" in violation of RICO.

Whatever may be the scope of RICO and the federal mail fraud statute in other contexts,[11] it is obvious that the alleged

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[10]Although 18 U.S.C. § 1964(c) refers only to United States district courts, the Supreme Court has held that state courts have concurrent jurisdiction over civil actions brought under RICO. *Tafflin v. Levitt*, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990).

[11]With regard to RICO, *see, e.g., H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). As to the federal mail fraud statute, *see McNally v. United States*, 483

actions of Travelers, upon which Merling relies, do not constitute a violation of the federal mail fraud statute. The Supreme Court in *McNally v. United States*, 483 U.S. 350, 358, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292, 302 (1987), quoting from *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924), pointed out with respect to the mail fraud statute that

> "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"

The Court went on to say "that the statute reache[s] false promises and misrepresentations as to the future as well as other frauds involving money or property." *McNally v. United States*, *supra*, 483 U.S. at 359, 107 S.Ct. at 2881, 97 L.Ed.2d at 302.

As outlined in Part I of this opinion, Travelers' actions were not wrongful. Travelers did not obtain Merling's property by "trick, deceit, chicane or overreaching" or by any "false promises and misrepresentations." The insurer's letters to the insureds were truthful and accurate. Travelers' actions were entirely lawful under the Maryland Insurance Code; in fact, the actions about which Merling complains were required by the Insurance Code, Art. 48A, § 234B.

Since Merling's allegations failed to set forth any wrongful acts by Travelers, the circuit court correctly dismissed the RICO count. For the reasons previously discussed, however, the circuit erred in granting summary judgment in favor of Merling on the other counts. The court should have granted Travelers' motion to dismiss those counts.

U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IN FAVOR OF BERNARD W. MERLING IS REVERSED. THE ORDER OF THE CIRCUIT COURT FOR BALTIMORE CITY DISMISSING COUNT FOUR OF THE COMPLAINT IS AFFIRMED. THE CASE IS REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH DIRECTIONS TO DISMISS THE ENTIRE COMPLAINT. COSTS TO BE PAID BY BERNARD W. MERLING.

APPENDIX C

Court of Appeals
of Maryland
Courts of Appeal Building
Annapolis, MD 21401-1699

June 5, 1992

Samuel C. P. Baldwin, Esq.
World Trade Center
Suite 414
Baltimore, MD 21202

John J. Kenny, Esq
6 East Eager Street
Baltimore, MD 21202

RE: *The Travelers Indemnity Company, Charter Oak Fire Insurance Company, and Phoenix Insurance Company v Bernard W. Merling*, No. 30, September Term, 1990

Dear Counsel:

Please be advised that the motion for reconsideration filed in the above entitled case was denied by the Court on June 5, 1992.

A copy of the mandate is enclosed herewith.

Very truly yours,

/s/ Alexander L. Cummings

Alexander L. Cummings
Clerk

AL:bmd

Encl.

cc: Thomas J. Schetelich
Esq., Lee H. Ogburn, Esq.

APPENDIX D

BERNARD W. MERLING doing business as MERLING & SON 8608 Philadelphia Road Baltimore, Maryland - 21237	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR BALTIMORE
THE TRAVELERS INDEMNITY COMPANY 1 Tower Square Hartford, Connecticut - 06183	*	CITY
SERVE ON:	*	Civil Action No.
E. Susan Kellogg, Insurance Commissioner 501 St. Paul Place Baltimore, Maryland - 21202	*	
and	*	
THE CHARTER OAK FIRE INSURANCE COMPANY 1 Tower Square Hartford, Connecticut - 06183	*	
SERVE ON:	*	
E. Susan Kellogg, Insurance Commissioner 501 St. Paul Place Baltimore, Maryland - 21202	*	
and	*	
THE PHOENIX INSURANCE COMPANY 1 Tower Square Hartford, Connecticut - 06183	*	

SERVE ON:

E. Susan Kellogg,
Insurance Commissioner
501 St. Paul Place
Baltimore, Maryland - 21202

and

HENRY A. FIORINI
901 Dulaney Valley Road
Towson, Maryland - 21204

Defendants

COMPLAINT AND ELECTION OF JURY TRIAL

Bernard W. Merling, doing business as Merling & Son, by his attorneys, Samuel C. P. Baldwin, Thomas J. Shetelich and Allen, Thieblot and Alexander, sues The Travelers Indemnity Company, The Charter Oak Fire Insurance Company and The Phoenix Insurance Company ("the Travelers Companies"), and Henry A. Fiorini, and for reasons state the following:

1. Plaintiff, Bernard W. Merling, is a citizen and resident of the State of Maryland, conducting his business as Merling & Son.

2. Defendants, The Travelers Companies, are each Connecticut corporations having their principal place of business in Hartford, Connecticut, are each registered and licensed to do business in the State of Maryland and regularly conduct business within this State.

3. Defendant, Henry A. Fiorini, is a citizen and resident of the State of Maryland

4. All claims alleged herein arose in the State of Maryland.

PARTIES

5. Plaintiff Merling is the sole proprietor of Merling & Son and is a licensed insurance broker and agent, conducting the business of his proprietorship as an independent property and casualty agent within the State of Maryland at all times relevant hereto.

6. Defendants, the Travelers Companies, are three of the insurance companies through which the personal lines insurance needs of Plaintiff's clients were met by appropriate policies of insurance.

7. Defendant, Henry A. Fiorini, is the manager, Agency Operations Department, Agency Marketing Group, Baltimore Office, of the Defendants, the Travelers Companies.

FACTS COMMON TO ALL COUNTS

8. By an Agency Agreement made effective April 1, 1969 ("the 1969 Agreement"), the Defendant, the Travelers Indemnity Company and an associated company made available to Plaintiff "the underwriting facilities and other services" of the insurers so that Plaintiff could submit applications or proposals for insurance, countersign policies and collect premiums for policies submitted to and accepted by either insurer. The 1969 Agreement is attached as Exhibit 1.

9. The 1969 Agreement provided that, to the extent the terms of the Agreement were accepted from time to time by Plaintiff, Plaintiff would be paid a part of the premium charged by the policyholder, called a "commission," and he would be guaranteed that such business developed by him would always remain his property. This guarantee is contained in Section 12 of the Agreement and reads:

> In the event of the termination of this contract, provided the Agent shall pay all collected premiums to the Company immediately, the Agent's records, use, and control of expirations shall remain his property and be left in his absolute possession; otherwise the records, use, and control of expirations shall be vested in the Company.

10. The authority granted Plaintiff to make use of the underwriting facilities and other services of the Defendants, the Travelers Companies, in the conduct of his business was expanded and the guarantee made to him was enlarged by an Agency Agreement made effective as of February 1, 1980 ("the 1980 Agreement"), by the terms of which all prior agreements were canceled.

11. Paragraph 2 of the 1980 Agreement granted Plaintiff all the power and authority previously granted under the 1969 Agreement and the additional right "to bind the Company and issue policies."

12. In contrast to the guarantee contained in paragraph 12 of the 1969 Agreement, paragraphs 14 and 15 of the 1980 Agreement read as follows:

> 14. The use and control of expirations, including those on direct-billed business, the records thereof, and the Agent's work product, shall remain in the undisputed possession and ownership of the Agent, and the Company shall not use its records of those expirations in any marketing method for the sale, service or renewal of any form of insurance coverage, or other product which shall abridge the Agent's rights of ownership, use, and control, nor shall the Company refer or communicate this expiration information or work product to any other Agent or Broker.

15. In the event of termination of this contract, and if Agent has paid all balances due the Company:

a. The Agent's records, use and control of expirations shall remain his property and be left in his absolute possession.

b. The Company shall furnish the Agent upon request a record of direct-billed policyholders, expiration dates, and details of the coverage provided, including the latest rating information recorded.

c. Paragraphs 3 and 4 (relating to commissions) of this agreement shall continue to apply to additional or return premiums written prior to the date of termination but expiring subsequent thereto.

Paragraph 15 continues, to specify that if the agent has not accounted for all sums due the company, the ownership of expirations shall vest in it and that "the Company shall use reasonable business judgment in selling such expirations and shall be accountable to the Agent for any sums received which, net of expenses, exceed the amount of indebtedness." The 1980 Agreement is attached as Exhibit 2....

16. In response to Plaintiff's inquiry as to how the Defendants would handle his business after February 20, 1988, Defendant Fiorini, in a letter dated September 10, 1987, attached hereto as Exhibit 6, stated in part as follows:

After February 20, 1988, it would be our desire to non-renew each policy as it expires. However, as you know, under Maryland law we are prohibited from doing so. Therefore, it is our intention to recode this business into an office

account, assume the servicing of that business, and pay no commission to any agency for this business.

17. Plaintiff responded to Defendant Fiorini by letter dated March 15, 1988, attached as Exhibit 7, in which it was asserted that "State Law obligates you to renew all policies through me," and that the Travelers Companies "are not to disturb the present insuror (sic)-agent-policyholder relationship."

18. Despite the protest of Plaintiff and despite the absolute guarantee to Plaintiff that it would not in any manner interfere with his ownership of his expirations, the Travelers Companies began mailing a form letter to his policyholders which advised that its business relationship with Plaintiff had ended, suggested that Plaintiff may have replaced the policyholder's coverage with another insurer, attached a renewal policy, offered to renew directly at the request of the policyholder and gave a toll long distance telephone number the policyholder might use should there by any question. This form letter is attached as Exhibit 8....

20. At all times relevant hereto, and as relevant hereto, the Insurance Code of Maryland, Article 48A of the Annotated Code of Maryland (the Code) provided, in section 234B(b), that "Notwithstanding any provision of the agreement to the contrary, the insurer shall continue for not less than one year after termination of the agency agreement to renew through the agent or broker any of the policies which have not been replaced with other insurers as expirations occur." ....

22. As a result of the actions of the Defendants referred to above, Plaintiff was denied the exclusive control and ownership of his expirations and the fruits thereof, was denied his exclusive right and obligation to continue to fully serve the needs of his clients insured through the Travelers Companies, was mislead as to the Travelers Companies' intentions concerning his business entrusted to them, Plaintiff's clients were deceived as to the effect of the

termination of Plaintiff's authority to submit applications for proposals for insurance coverage and/or to bind and execute contracts of insurance and were denied any further representation by Plaintiff vis a vis the Travelers Companies, and Plaintiff lost a continuing flow of income through the Travelers Companies in an amount approximately $1,500,000.00.

COUNT 1.....

APPENDIX E

IN THE COURT OF APPEALS OF MARYLAND	*	
BERNARD W. MERLING doing business as MERLING & SON	*	—
Petitioner	*	
v.	*	
THE TRAVELERS INDEMNITY COMPANY	*	Misc. No.
and	*	
THE CHARTER OAK FIRE INSURANCE COMPANY	*	
and	*	
THE PHOENIX INSURANCE COMPANY	*	
Respondents	*	

* *

PETITION FOR WRIT OF CERTIORARI

Bernard W. Merling, trading as Merling & Son, by his attorneys, SAMUEL C.P. BALDWIN, THIEBLOT, RYAN, MARTIN & FERGUSON and THOMAS J. SCHETELICH, pursuant to Maryland Rule 8-303, petitions for a writ of certiorari.

1. Mr. Merling was the Plaintiff in the case of *Bernard W. Merling v. The Travelers Indemnity Co., et. al.*, in the Circuit Court for Baltimore City, Civil No. 88348037/CL90572. Both Plaintiff and Defendants have appealed from the judgment of the Circuit Court.

2. Attached to this Petition for Certiorari are copies of:

(a) the Order of the Circuit Court (Judge Thomas Ward) dated June 8, 1989, resolving all liability issues by summary judgment, and Judge Ward's oral opinion of May 10, 1989; and

(b) the Order of the Circuit Court (Judge Joseph Kaplan) dated January 5, 1990, entering judgment for damages, and Judge Kaplan's Memorandum Opinion of December 12, 1989.

3. The case has not been heard or decided by the Court of Special Appeals.

4. The judgment of the Circuit Court adjudicated all claims in the action in their entirety.

5. The date of the Circuit Court judgment is January 5, 1990.

6. The issues presented for review concern the relationships among a property/casualty insurance carrier, an independent agent, and the policyholder, as defined by common law and statute. The issues presented particularly concern the right of the policyholder to choose his agent, and the right of an independent agent to compensation for conversion of his expirations by the insurer.

Specific issues presented for review are:

(a) Did the Defendant insurance companies convert Mr. Merling's property rights to their own use by communicating directly with his insureds and placing these policies in an internal house account, thereby depriving Merling of his commissions in renewal business; and is such conversion permitted by common law or statute because the Defendant insurance companies terminated

Merling's right to submit new business? The Circuit Court granted a Plaintiff's summary judgment on this issue.

(b) Did the Defendant insurance companies tortiously interfere with Mr. Merling's contract rights and property rights by communicating directly with his insureds and placing these policies in an internal house account, thereby depriving Merling of his commissions in renewal business and violating the rights of the insureds under §234A of the Insurance Code by forcing them to choose between the agent and the company? The Circuit Court granted a Plaintiff's summary judgment on this issue.....

7. Statutes pertinent to the issues raised are:

18 U.S.C. §1962 and §1964 (1970)

Maryland Code Ann. Article 48A (1986)

§166(b)

§175

§218

§234A

§234B

§240B.....

APPENDIX F

[Filed
May 21, 1992
Alexander L. Cummings, Clerk
Court of Appeals]

IN THE

COURT OF APPEALS OF MARYLAND

September Term, 1990
No. 30

THE TRAVELERS INDEMNITY COMPANY et al

Appellants and Cross-Appellees

- - - v - - -

BERNARD W. MERLING

Appellee and Cross Appellant

PETITION FOR RECONSIDERATION OF THE OPINION OF THE COURT, DATED 4-24-92

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(410) 625-0000

Counsel to Merling, the Petitioner herein

May 21, 1992

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1990
No. 30

THE TRAVELERS INDEMNITY COMPANY, et al.

Appellants and Cross-Appellees

v.

BERNARD W. MERLING

Appellee and Cross-Appellant

PETITION FOR RECONSIDERATION OF THE OPINION OF THE COURT DATED 4-24-92

Bernard W. Merling, by counsel, respectfully requests that this Honorable Court reconsider its Opinion filed in the above entitled case April 24, 1992.

INTRODUCTION AND SUMMARY

The essence of the Court's Opinion in this case is that Merling was not such an absolute owner of the business he had developed over the years that it could not be taken from him. That where the Travelers made the decision not to accept further new business from Merling, Travelers was thereafter statutorily protected in appropriating to its own use and benefit so much of Merling's existing business as he was unable to salvage legally, by forced sale and/or by "moving" the insureds to other carriers [neither the restriction of §175 of the Insurance Code nor the agent's common law duty to his principal, the insured being noted by the court.] The Court held that "By Ch. 73 of the Act of 1972, the General Assembly amended §234B so that a *compromise* was reached between the agent's right to his expirations following termination and the State's interest in

protecting the insureds from cancellations or non-renewals;" (emphasis added). By statute, the Court ruled, the agent's exclusive and unlimited *common law* right to his expirations was significantly diminished.

It is respectfully submitted that this is an inappropriate premise upon which to base an appropriate conclusion in this case, *if* the Opinion is intended to relate to "independent agents" as defined by §166(b) of the Insurance Code [Article 48A of the Annotated Code, "the Code" hereafter], and as also defined by the provisions of §§14 and 15 of the Travelers' Agency Agreement. If, on the other hand, the Court means to equate that Agreement with those in *Hedlund v. Farmers Mutual Automobile Insurance Company, 139 F. Supp. 535* (D. Minn. 1956), *Shrewsbery v. National Grange Mut. Ins.*, 395 S.E.2d 745, and like factual cases, based upon common law or contractual limited ownership guarantees, the equation, with all due respect to the Court, is in error.

The American Agency System, under which Merling and Travelers conducted their *individual* businesses, has been judicially termed the "universal custom" and "main premise under which the American insurance industry functions," *Matter of Estate of Corning*, 488 N.Y.S.2d 477 (1985), at 481. Under this system, the insurer is the beneficiary of the agent's efforts on behalf of his agency and the insureds are the beneficiary of the agent's continuing efforts on their behalf. In this system, the independent agent - not the insured - is the insurer's customer, *In Re Roy A. Dart Ins. Agency, Inc.*, 5 B.R. 207, 209-10 (U.S. Bankr. Ct. D. Mass 1980). *Shared ownership* of expirations, on the other hand, is an estate outside of that manner of doing business.

ARGUMENT

The common law American Agency System has been memorialized by contract and further memorialized by statute in Arizona, New Jersey and, it is respectfully submitted, in Maryland.

Indeed, the New Jersey and Maryland regulatory statutes reflect the same overriding concern for the public good.

In New Jersey, noted by the Court, N.J.S.A. 17:22-6.14a(d) provided for continuation of commissions, post-termination of an Agency Agreement, for a total period of one year, while N.J.S.A. 39:6A-3 "requires the company to renew indefinitely provided only that the insured continues to meet underwriting standards...," *Cohen v. Home Insurance Company*, 230 N.J. Super. 72, 552 A.2D 654, 656 (N.J. Super, A.D. 1989); [§234A of Maryland's Code requires renewal of policy for an indefinite period, and §234B(b) requires continued renewal, from which commissions are generated.] Subsequent to the *Cohen* decision [confirming the independent agent's right and duty to service the needs of his client's post-termination, and the insurer's duty to continue to compensate the agent], New Jersey amended its law to legislatively support the American Agency System; *See* N.J.S.A. 17:22-6.14a(1); *Matter of Terminated Aetna Agents*, 248 N.J. Super. 255, 590 A.2d 1189, 1190 (N.J. Super. A.D. 1990), certiorari denied.

Essentially, the amended New Jersey statute permitted notice to the policyholder that the Agency Agreement was terminated and that the policyholder had the option of continuing to receive service from his "terminated agent" or of selecting a new agent [a right which existed without statute, in any event]; commissions would continue at the rate which existed prior to termination - in essence, the American Agency System.

In Maryland, and as originally enacted, §166 of the Code defined an "agent." By Ch. 819 of the Acts of 1976, the General Assembly repealed and reenacted, with amendments, this section of the Code, adding the definition of an independent agent as follows:

> (B) An "independent agent means an agent as defined in subsection (A) of this section and:

> (1) Who is not owned or controlled by an insurer or group of insurers;
>
> (2) Whose agency agreement does not prohibit the representation of more than one insurer or group of insurers; and
>
> (3) Whose agency agreement provides that at the termination of the agency the agent's records shall remain the property of the agent, and that the agent retains the use and control of all expirations incurred during the agency.
>
> A person or corporation other than an independent agent may not be represented to the public as an independent agent.

Subsection (B) took effect as of July 1, 1976, **four years after** the enactment of Ch. 73 of the Acts of 1972, requiring the insurer to continue "**for not less than** one year after termination of the agency agreement to renew **through the agent**... any of the policies which have not been replaced with other insurers as expirations occur..."

The Travelers' Agency Agreement with Merling was dated February 1, 1980, by the terms of which offer to participate in Merling's business, Merling was promised a stated part of the premium Travelers would charge for any policy issued and was promised that Travelers would not make use of Merling's expirations. The acceptance of this offer, and its breach, is the basis for Merling's suit. **This promise was made eight years after the enactment of Ch. 73 and four years after the guarantee of non-interference was codified by enactment of Ch. 819.**

This Court, in *Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588,606, 386 A.2d 1216 1228-29 (1978), stated:

> Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where the 'common sense of the entire community would... pronounce it' invalid. This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds **also serves to protect the public interest**.... (Emphasis added).

(A) Is the public interest served where a statute can be read to force members of the public to choose between the independent agent of choice or the insurance coverage then in force, in the circumstance that the insurer no longer holds out its offer (the Agency Agreement) to accept new business from the agent?

(B) Where an insurer and an agent voluntarily enter into an agreement which subsequently becomes in operative part a contract, and the agent enters into an obligatory contractual relationship with a member of the public, and where both contracts precede the issuance of an insurance contract, can it be said that either or both precedent contracts are against some public policy so that they may be abrogated at the will of the insurer?

These questions are of immediate concern if the Opinion of the Court is to be read as limiting the absolute ownership of the business an independent owner develops for his agency, guaranteed by contract and supported by statute. There are other well founded decisions of this Court, the continued validity of which are put into question.

(1) Article 1 §17 of the Code requires that where two or more amendments to the same section or subsection of the Code are

enacted at the same or different sessions of the General Assembly, they shall be reconciled if possible; if not possible, the later amendment shall prevail. If §166(b) of the Code is to serve some purpose in the regulatory scheme,

(A) does not the earlier §234B(b) give way to the later enactment if it cannot be reconciled therewith?

(B) since the later enactment recognizes the absolute ownership of expirations by the independent agent, the earlier §234B(b) requires renewal "of the policies which have not been replaced with other insurers as expirations occur," and, since that option is the property of the insured, must not the phrase "not less than" depend upon the decision of the insured?

(2) The rule, in *Keystone Mut. Cas. Co. of Pittsburg, Pa. v Hinds*, 180 Md. 676, 26 A.2D 761,762 (1942), is that "[a]fter a statute has been enacted governing some part of the field of insurance, any persons who have entered into a contract within that field are presumed to have done so with full recognition of the obligations demanded by the statute." Does not this rule of law apply to the facts of this case?

(3) Paragraph 13 of the Travelers' Agreement, in part, provides that: "Further, if the Agent is in compliance with all of its obligations under this contract and all applicable statutes and regulations, all policies expiring within a one-year period following the effective date of termination meeting then current company underwriting standards may, at the option of the Agent, be renewed for one additional year, at the rate of commission and upon the terms in effect at the time of termination."

(A) In the light of mandatory renewal statutes, do policies "expire"; *see*, e.g. *Frank Lucas Insurance Agency, Inc. et al v. Fireman's Fund American Insurance, et al.*, 48 Md. App. 122, 425 A.2d 1378 (1981), certiorari denied 6-29-81.

(B) Subject to meeting underwriting rules, is not the option to direct renewal or nonrenewal vested in the insured?

(C) The *Lucas* court concluded that "It is obvious under Md. Ann. Code Art. 48 (sic.), §§234A and 234B... that policyholders are not to be required to take action in order for their coverage to be continued." Is that rule of law no longer valid?

CONCLUSION

It is respectfully submitted that the New Jersey statute, as interpreted in *Cohen*, supra, and as subsequently amended, mirror the statutory law as it developed in Maryland, and the judicial interpretation of Maryland's regulatory scheme should be the same as that of the New Jersey appellate court.

Reacting to the insurer's claim that the time limitation of the statute insulated it from any further payment of commissions to the "terminated agent," the *Cohen* court disagreed, stating:

> ...In our view, the real question in this case is whether there are indeed such compulsions which leave both the company and the terminated agent with no viable alternative to continuing their agency relationship in respect of automobile insurance renewals. If such compulsions do exists, then clearly quasi-contract principals apply...

552A.2d at 657.

Notwithstanding the impending amendment to the New Jersey statute, Aetna entered into a settlement agreement with a number of its "terminated agents" by the terms of which, commissions were to be reduced and finally eliminated. With the new amendment, the agents sued to abrogate the settlement agreement. The court rules that the agreement was against public policy and unenforceable, holding that:

> Through the use of the economic disincentives created by reduced and, ultimately, non-existent commissions, the agents would be motivated to seek to replace policies with other carriers or to materially reduce servicing performance for New Jersey policyholders in order to survive economically... Such a result clearly contravenes both expressed legislative intent and the public interest by denying New Jersey policyholders the statutory right of "guaranteed renewals of indefinite duration." ....
>
> Contracts affecting public interest should be construed in a manner that is most favorable to the public...
>
> The public interest expressed in that statute strongly suggests that New Jersey policyholders should not be deprived of the benefit of continued effective policy service by motivated agents...

Matter of the Terminated Aetna Agents, supra, 590 A.2d at 1191-92 (1991) (Citations omitted).

WHEREFORE, it is respectfully requested that the Court review its Opinion in the within titled case and distinguish the facts upon which its decision rests from those applicable to the "independent agent" as described by statute and contract, or, upon reconsideration, withdraw its Opinion as against the public policy of the State (if it is intended to include "independent agents" whose absolute, unconditional, ownership of expirations is recognized both by contract and by statute), or if deemed appropriate, grant further argument or such other relief as circumstances dictate.

Respectfully submitted,

/s/ Samuel C. P. Baldwin

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Kenny, Vettori & Robinson

/s/ John J. Kenny

By: John J. Kenny
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(410) 625-0000
Counsel to Merling

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 1992, I caused two copies of the foregoing Petition for Reconsideration to be mailed, postage prepaid, to Lee H. Ogburn, Esquire, Kramon & Graham, P.A., Sun Life Building, Charles Center South, 20 South Charles Street, Baltimore, Maryland - 21201

/s/ Samuel C. P. Baldwin

APPENDIX G

Chapter 819 of The Laws of Maryland, 1976

CHAPTER 819
(House Bill 1761)

AN ACT concerning

Independent Insurance Agent - Defined

FOR the purpose of defining an independent insurance agent; and providing that only those agents meeting this definition may hold themselves out to the public as Independent Insurance Agents.

BY repealing and reenacting, with amendments,

Article 48A - Insurance Code
Section 166
Annotated Code of Maryland
1972 Replacement Volume and 1975 Supplement)

SECTION I. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section 166 of Article 48A - Insurance Code, of the Annotated Code of Maryland (1972 Replacement Volume and 1975 Supplement) be and it is hereby repealed and reenacted, with amendments, to read as follows:

Article 48A - Insurance Code

166.

As used in this subtitle:

(a) An "agent" is a person appointed by an insurer (1) to solicit applications for insurance or annuities or to negotiate insurance on its behalf; and (2) if authorized to do so by the insurer, to effectuate and countersign insurance contracts. The term "agent" shall not include: .....

(B) An "INDEPENDENT AGENT" means an agent as defined in subsection (a) of this section and:

(1) Who is not owned or controlled by any insurer or group of insurers;

(2) Whose agency agreement does not prohibit the representation of more than one insurer or group of insurers; and

(3) Whose agency agreement provides that at the termination of the agency the agent's records shall remain the property of the agent, and that the agent retains the use and control of all expirations incurred during the agency.

A person or corporation other than an independent insurance agent may not be represented to the public as an independent agent.

Section 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1976.

Article 48A §175(15), Annotated Code of Maryland

§ 175. Grounds for refusal, suspension or revocation of certificate.

An original application for a certificate may be refused until the Commissioner is satisfied under the provisions of §§ 35-39 that the applicant is not guilty of violating any provisions of this section. A certificate duly issued may be suspended or revoked or the renewal thereof refused by the Commissioner if he finds, after notice and hearing in accordance with the provisions of §§ 35-39, that the applicant for, or holder of such certificate: .....

(15) Has intentionally or willfully made or issued, or caused to be made or issued, any statement materially misrepresenting or making incomplete comparisons regarding the terms or conditions

of any policy or contract issued by any authorized insurer, for the purpose of inducing or attempting to induce the owner of such policy or contract to forfeit or surrender such contract or allow it to lapse for the purpose of replacing such policy or contract with another; or....

Article 1, § 17 Annotated Code of Maryland

Art. 1, § 17. Inconsistent amendments to same Code section or subsection.

If two or more amendments to the same section or subsection of the Code are enacted at the same or different sessions of the General Assembly, and one of them makes no reference to and takes no account of the other or others, the amendments shall be construed together, and each shall be given effect, if possible and with due regard to the wording of their titles. If the amendments are irreconcilable and it is not possible to construe them together, the latest in date of final enactment shall prevail. (1957, ch. 45).

Chapter 73 of the Laws of Maryland, 1972

CHAPTER 73
(House Bill 444)

AN ACT to repeal and re-enact, with amendments, Section 234B of Article 48A of the Annotated Code of Maryland (1968 Replacement Volume and 1971 Supplement), title "Insurance Code," subtitle "15. Unfair Trade Practices,"; to repeal and re-enact with amendments, Section 240A of said article, title and subtitle.....

.....establishing procedures for the cancellation by certain insurers of certain agreements with agents and brokers and requiring said insurers to renew ~~policies of motor vehicle liability~~ CERTAIN POLICIES OF insurance written through such agents and brokers under certain circumstances.....

Section 1. *Be it enacted by the General Assembly of Maryland,* that Section 234B of Article 48A of the Annotated Code of Maryland (1968 Replacement Volume and 1971 Supplement), title "Insurance Code," subtitle "15. Unfair Trade Practices," be and it is hereby repealed and re-enacted, with amendments; that Section 240A of said article, title and subtitle be and it is hereby repealed....

234B. Unfair or discriminatory treatment of agent or broker.

(a) *No insurer may cancel a written agreement with a broker or agent with respect to ~~motor vehicle liability~~ insurance or refuse to accept motor ~~vehicle liability~~ insurance business from such broker or agent unless it complies with the provisions of this section.*

(b) ~~If an insurer intends to cancel such a written agreement with a broker or agent or to refuse to accept such further business from such broker or agent, it shall give at least sixty days written notice of its intention to the broker or agent and to each person insured by the insurer through the broker or agent. The notice to~~

~~*the insured shall state (i) the intention of the insurer to cancel its agreement with the broker or agent, or not to accept further business from each such broker or agent, (ii) the right of the insured to replace his insurance, upon its expiration, through the broker or agent with another company, and (iii) the right to have the insurance renewed directly by the insurer or by the insurer through another broker or agent.*~~

(c) ~~*If an insurer who cancels such a written agreement with a broker or agent or refuses to accept such further business from a broker or agent is not advised in writing that policies it has written through such agent or broker have been replaced by other insurance, the insurer shall, at least forty-five days prior to the expiration of each such policy, offer to renew the same directly or through another broker or agent; and unless the insurer is thereafter advised by the insured that he does not wish the policy to be renewed, the insurer shall, upon tender of the appropriate premium, renew the policy for at least one year; provided, however, that nothing contained herein shall prevent the insurer from allowing the insured to pay the premiums on a periodic basis or from canceling the policy for nonpayment of premiums.*~~ *IF AN INSURER INTENDS TO CANCEL A WRITTEN AGREEMENT WITH AN AGENT OR BROKER, OR.....*

SEC. ~~6~~ 7. *Be it further enacted,* That all laws or parts of laws, public general or public local, inconsistent with the provisions of this Act are repealed to the extent of the inconsistency.

SEC. ~~7~~ 8. A*nd be it further enacted,* That this Act shall take effect January 1, 1973.

Approved April 26, 1972.

Chapter 175 § 162F, Massachusetts Annotated Law

AGENTS, BROKERS AND ADJUSTERS

§ 162F. Property or casualty insurance information; proprietary rights of agents and brokers.

A duly licensed agent or a duly licensed broker doing business pursuant to the so-called American agency system, other than that of an employer to employee relationship, shall own and have an exclusive right to use certain insurance information contained in insurance policies, certificates of insurance or a written memorandum of a preliminary contract of insurance issued by said agent or broker, embodying the records of an insurance agency which shall include but not be limited to the policy inception date, the amount of insurance coverage, the policy number, the name of the insurance company, the name of the insured, the amount of insurance premiums and the terms of insurance. Any bank, lending institution, mortgage company, or mortgagee, whether acting under state or federal authority, including but not limited to those banks as defined in section one of chapter one hundred and sixty-seven, or any loss payee who obtains said insurance information as evidence or proof of insurance shall be prohibited from using, selling, or transferring said insurance information to any third party for the purpose of marketing, underwriting, or soliciting insurance. The provisions of this section shall apply only to property and casualty insurance.

Added by St.1988, c. 229.

Historical and Statutory Notes

1988 Legislation

St.1988, c. 229, was approved July 27, 1988.

Article 21 § 2101 (a) (b), New York Insurance Law

§ 2101. Definitions

(a) In this article, "insurance agent" means any authorized or acknowledged agent of an insurer or fraternal benefit society, and any sub-agent or other representative of such an agent, who acts as such in the solicitation of, negotiation for, or procurement or making of, an insurance or annuity contract, other than as a licensed insurance broker, except that such term shall not include: .....

(b) In this article, "independent insurance agent" means an "insurance agent" who is not owned or controlled by any insurer or group of insurers and whose agency agreement does not prohibit the representation of other insurers or groups of insurers and which provides that upon termination of the agreement the agent's records and use and control of expirations remain the property of the agent. Only an "independent insurance agent" shall be represented to the public as an independent insurance agent or agency.....

Article 34, § 3425 (j)(1)(D), Insurance Law of New York

(Cited by the Court of Appeals in FN.7)

§ 3425

(j)(1) Where an insurer or an agent who is authorized by such insurer to accept lines of insurance from licensed agents or brokers notifies a licensed agent or broker that its contract or account shall be terminated: ....

(D) the terminated agent or broker shall be entitled to receive commissions on account of all business continued or written pursuant to this paragraph at the insurer's prevailing commission rate for such lines of insurance; and

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APPENDIX H

IN THE CIRCUIT COURT FOR BALTIMORE CITY

JAMES JONES, et al -

Plaintiff

Vs. CASE NO. 86122089/CL49722

MARYLAND CASUALTY COMPANY -

Defendant

and

LENOUS G. BAILEY, et al -

Plaintiff

Vs. CASE NO. 86211059/CL53682

MARYLAND CASUALTY COMPANY -

Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland
January 29, 1988

BEFORE:

HONORABLE THOMAS WARD - Judge

APPEARANCES:

In Behalf of the Plaintiffs:

THOMAS M. WOOD, IV, ESQUIRE
JOHN J. KENNY, ESQUIRE
SAMUEL C. P. BALDWIN, ESQUIRE

In Behalf of the Defendant:

JANET TRUHE, ESQUIRE
DAVID M. BUFFINGTON, ESQUIRE

Reported by:
JOHN E. CROUT, JR.
Chief Court Reporter
Court House East
Baltimore, Maryland 21202

...THE COURT: You know at the last hearing I mentioned the different ways - what I thought the public policy of the state was and the reason why the Maryland General Assembly has interjected themselves so strongly into the field of insurance. One of the things I said is the policyholders themselves want to be able to continue with the policy that they have. I don't think anybody disagrees with that. In other words, the general public, if they have an automobile policy, for example, from year-to-year, they expect that policy to be continued on and on because they are fearful of losing their insurance. They are quite proud of the fact they have no claims, hopefully, and they know if they lose this policy it might be difficult to get the same benefits. Whether it is true or not I don't know, but they think it is true and the Legislators have reacted to that and they have passed all kinds of laws with respect to revocation of policies, why you can do it and rates and so forth.

So what you are saying here is that your company has a right to tell an agent after, let's say, he has had a thousand customers who have policies of automobile insurance, that you are going to terminate that relationship and notify all the customers, create chaos in their minds, but, more importantly, have the effect that the agent, himself, is going to want to try to steer them in another direction so he can get a commission because he is not going to get it any more with you, so he is going to want to get it somewhere else, and that terminated agent is going to be working against your interest in effect, which you say you really don't care about, but is that in the interest of the general public to do that, to have the agent suddenly know that his commissions are at an end and he is going to try to keep that business, is that what the Annapolis lawmakers have been telling us they want to have happen? No, they have not, and, to me, it is clear from reading their decisions, their enactments that what they want to have happen is that the status quo, as far as the customers are concerned, be continued wherever possible, and one way to do that is to bring the agent his commissions, then he won't have the desire to upset the apple-cart, protect him and continue

him the right, not the right, but the obligation to service the policy, because there is no other way to do it and someone has got to service the policy, and he's getting paid for it besides.

Of course, this is flying in the face of what you are arguing, but that's what I think the public policy of the State is.

MR. BUFFINGTON: No. Well, I disagree with the Court, most respectfully, because what the courts or what the Legislature was considering was the policyholder, not the agent, not the company.

THE COURT: Yes, exactly. That's what I just finished saying.

MR. BUFFINGTON: If I may continue, Your Honor --

THE COURT: Yes.

MR. BUFFINGTON: -- and the public's interest is best served in this case by their being continued with the company, which they are. We are renewing all of these people, but they are being serviced by an agent of our company who can do the job.

THE COURT: What do you think the agent is going to do who had all these customers? What do you think he is going to do now?

MR. BUFFINGTON: He doesn't have the authority to replace them because he cannot service them properly.

THE COURT: What is he going to do? What is the agent going to do? What is his natural inclination when this happens? What is he going to do?

MR. BUFFINGTON: If he has another company, for instance, if he has another agency agreement with a first-line company such as U.S.F.&G. --

THE COURT: Suppose he doesn't.....

APPENDIX I

Samuel C. P. Baldwin
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Baltimore, Maryland 21202
(301) 685-6164

December 7, 1990

Honorable Alexander L. Cummings, Clerk
Court of Appeals of Maryland
361 Rowe Boulevard
Annapolis, Maryland - 21401

Re: The Travelers Indemnity Company v. Merling
No. 30, Sept. Term, 1990, Argued 11-2-90

Dear Mr. Cummings:

Enclosed herewith are seven copies of this and of an as-yet unreported Opinion of the Superior Court of New Jersey, Appellate Division, in a case styled *In the Matter of the Terminated Aetna Agents* (12-3-90), attached hereto. This case, and the decision of that Court in *Cohen v. Home Ins. Co.*, 230 N.J. Super. 72, 552 A2d. 654 (1989), to which the Court refers, are highly relevant on both legal and policy grounds to the issues before the Court of Appeals in the above referenced matter.

The issue before the Court was whether it could uphold the terms of a written agreement between the insurer and its "terminated agents" reducing renewal commissions notwithstanding that the agents continued to service the policies and their clients, and that the provisions of New Jersey statute - N.J.S.A. 17:22-6.14a - required the insurer to continue to pay the agent the full commission in such circumstance. The Court observed that approval of such a contract would provide a method by which insurers could avoid their statutory renewal obligations while simultaneously

gaining an "unapproved windfall." In upholding the earlier decision of the Insurance Commissioner to rule unenforceable the contract, the Court stated:

> Contracts affecting public interest should be construed in a manner that is most favorable to the public. When enforcement of a contract inflicts injury upon the public in some way, a court will not hesitate to declare that contract void as against public policy. The Commissioner thus reasonably and correctly determined that the statutory provisions of N.J.S.A. 17:22-6.14a should prevail over the strict terms of this contract.

Slip Op. at 5-6; citations omitted.

Having noted, earlier in its Opinion that reduced and/or eliminated commissions created "economic disincentives" to the "terminated agent" in consequence of which the insured could suffer lack of service or loss of representation, the Court continued:

> The public interest expressed in that statute strongly suggests that New Jersey policyholders should not be deprived of the benefit of **continued effective policy service by motivated agents. See** also our opinion in *Cohen v. Home Ins. Co.*, 230 N.J. Super. 72 (App. Div., 1989). (Emphasis added.)

At the time of the *Home* dispute, apparently the New Jersey statute placed a time limitation on mandated renewal through agents whose Agency Agreements had been terminated. The Court stated:

> The question then, as we view it, is whether, in respect of automobile insurance policies renewed pursuant to N.J. S.A. 39:6A-3, the time limitations of N.J.S.A. 17:22-6.14 a(d) insulate insurance companies from paying their terminated agents compensation for services which, as a

> matter of legal, contractual and economic compulsions, the companies are virtually required to accept and the terminated agents are virtually required to perform.

552 A2d at 656.

Having stated the question, the Court expressed the opinion that the trial court had dismissed the plaintiff's case in the belief that the statute did afford the insurer such insulation.

> We disagree. In our view, the real question in this case is whether there are indeed such compulsions which leave both the company and the terminated agent with no viable alternative to continuing their agency relationship in respect of automobile insurance renewals.

552 A2d at 656-657.

The Court remanded the case - but not **exactly** as was later indicated. Its direction to the trial court was that if it should conclude "that plaintiff has an express contractual right to commissions under Article 11(3) of the agency agreement, judgment may be entered for plaintiff **without trial** of the quasi-contract clause." (552 A2d. at 660-661, emphasis added.)

One of the fundamental arguments on behalf of the Maryland "terminated agents" has been that the provision of Article 48A section 234B(b) requiring renewal through them "for not less than one year" those "policies which have not been replaced with other insurers as expirations occur" cannot be read to abrogate either the contractual obligation of the insurer to the agent or the contractual and fiduciary relationships between the agent and his client, the insured; nor can it be read to deny the insured his choice of representative as a precondition to the continued renewal protection granted by other sections of the Article. The Appellee/Cross Appellant would urge upon the Court that the New Jersey opinion rendered just last Monday parallels those arguments made on behalf

of the Maryland agents and fully supports the decisions of the trial courts both in the above referenced case and those now pending in the Court of Special Appeals. For that reason, Mr. Cummings, we respectfully request that the enclosed copies be transmitted to the members of the Court.

Cordially,

/s/ Samuel C. P. Baldwin

Copy of this, and of the attachment hereto, has been mailed to:

Lee H. Ogburn, Esquire, Attorney for The Travelers

David M. Buffington, Esq., Attorney for Amicus Curiae, Maryland Cas. Co.

Thomas Waxter, Jr., Esq., Attorney for Amicus Curiae, Aetna Cas. & Sur.